



## SPOTLIGHT

In this edition, we focus on claims, insurance issues and policy/technological developments in the transport arena.

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## Future Editions

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## Welcome to the November 2024 edition.

**Stratos Gatzouris (DWF and Editor in Chief)**  
**Jeffrey Wale (FOIL Technical Director and Assistant Editor)**

Welcome to the November 2024 edition of the Voice. FOIL looks forward to our AGM and President's Conference in London on the 21 November 2024 (see page 6). We encourage members to attend both important calendar events. It is also an opportunity for members to thank our current president, Pete Allchorne (DAC Beachcroft) for his tireless work to press the FOIL agenda in multiple forums and ways. FOIL would not function effectively without the commitment and work of our Presidents, the National Committee, our Sector Focus Teams and individual members.

In this edition, the core theme is the transport agenda. We start with an introduction from the FOIL President, raising important questions about how society should balance improvements in terms of mobility in a sustainable and cost-effective way. In subsequent articles, contributors try to unpack various aspects of the transport agenda, the associated insurance risks and claims environment.

Steven Cross, Head of Claims at Markerstudy Insurance Services Ltd looks at the impact of the whiplash reforms in terms of mixed injuries in RTA claims and raises important issues in the context of implausibility. For those of you less familiar with the Official injury Portal, there is a helpful overview of the platform from Paul Finn (FOIL).

Ruth Graham and William Balfry (DWF) discuss the impact of changes in transport behaviours and examine the impact of technological disruption in this arena. Steven Brownlee (FOIL) explores the role that E-transport options can and are likely to play in

the delivery of targets in the wider ESG agenda.

Selma Tarim and Sara-Jane Eaton (DWF) offer insight into the handling and legal approach to cross border related personal injury claims post Brexit, many of which occur in the travel or transport context. We should also take this opportunity to highlight the FOIL [Moving Forward Together](#) event at Clyde & Co, London on 2 December 2024. This event promises an in depth look at issues thrown up by cross jurisdictional claims post Brexit offering a range of UK/EU and claimant/defendant perspectives.

In their case spotlight, Jessica Copley and John Sheehy (DAC Beachcroft, Ireland) consider the Supreme Court's judgment in *Urban and Recycling Ltd & RSA Insurance v Zurich Insurance plc* [2024] and the implications for Irish motor and employers' liability insurers.

We also hear from Bridget Tatham and Marlene Henderson (Browne Jacobson) on the importance of diversity, equity and inclusion (DEI) to FOIL members and their clients, and the recognition by stakeholders that integrated sound DEI practices, policies and processes is above all the right thing to do.

In addition to the usual updates and news from FOIL across the UK, we hear from Hawkins (a FOIL sponsor) on the developments in their global business and expert offering. We hope that you enjoy reading the content and look forward to receiving your ideas for the next edition of the Voice. Once again, many thanks to Ian Thornhill for his work as the content coordinator on this edition.

### Stratos and Jeff



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## The President's Page

### Full Speed Ahead



#### **Pete Allchorne (DAC Beachcroft Claims Ltd and FOIL President)**

Welcome to the latest edition of The Voice! The focus of this edition is 'Transport' – a vital ingredient in our economy. It's what allows us to move freely, enabling us to connect and commerce to thrive. I first became involved in the Future Transport agenda almost a decade ago, when I was part of FOIL's Motor Sector Focus team. It seems somewhat fitting then that my last President's page entry should be dedicated to this subject.

It's perhaps not surprising that investment in Transport is firmly on the new Labour government's agenda, with commitments ranging from the re-nationalisation of the railways to the filling in of an additional one million potholes per year.

Labour's manifesto promised significant investment in infrastructure and the creation of a modern transport network. Also, within its manifesto, Labour promised to investigate the reasons for the high cost of motor insurance premiums. A taskforce has now

been constituted to look at this. Led by the Secretary of State for Transport, The Rt Hon Louise Haigh MP and the Economic Secretary to the Treasury, The Rt Hon Tulip Siddiq MP, together with representatives from the Financial Conduct Authority and the Competition and Markets Authority and support from a stakeholder group consisting of trade and consumer organisations, it is tasked with finding solutions for implementation. FOIL is well placed to help inform the debate, and we have reached out to ministers to offer our support.

As a self-confessed 'petrolhead', Transport, and more particularly Road Transport is a subject that is very close to my heart. It is an area that has in recent years witnessed innovation and change, with the introduction of Battery Electric Vehicles (BEVs), Advanced Driver Assistance Systems (ADAS) and E-scooter trials, to name but a few. What's more, as the governments of the day grapple with new technologies, powerplants and mobility solutions that will underpin a sustainable, modern transport network of the future, we can expect to see more of the same in the years ahead, which will require insurance lawyers to engage in the legislative and regulatory change programme.

Meanwhile, there are lots of issues for motor insurers to grapple with here and now. Battery Electric Vehicles are expensive to repair, with a shortage of skilled technicians meaning that supply doesn't currently match demand. Then there are issues regarding uncertainties regarding battery integrity when a BEV is involved in a collision, in some instances confusion regarding which policy responds in the event of an incident involving home charging.

With regards to ADAS, I liken the new vehicles of today as 'computers on wheels'. Laden with tech, often mounted within the bumpers,

even a fairly innocuous bump can result in an expensive repair. 2025 will see the introduction of the UN-ECE Driver Control Assistance Systems (DCAS) regulation, which although stopping short of true automation (the driver will remain legally in control), will enable the vehicle to undertake the acceleration, braking and steering tasks in a much broader range of driving environments (not just motorways), and will enable assisted lane changes. We are likely to see a proliferation of assisted driving tools on a much wider range of vehicles as a result. ADAS is no longer the domain of the prestige marques.

After a long hiatus since the Automated and Electric Vehicles Act 2018 set the insurance framework for automated vehicles, this year saw the introduction of a substantive piece of primary legislation in the Automated Vehicles Act, which will pave the way for the practical implementation of vehicle automation on Britain's roads. But the Act lacks a lot of detail, and there will need to be a period of stakeholder consultation on things like data sharing and cyber security, as well as on general safety principles and, thereafter a substantial amount of secondary legislation will need to follow.

Lastly, on the subject of micromobility, we are still awaiting the outcome of the previous government's consultation on e-bikes, which sought views on a proposal to double the maximum continuous power output, and to allow 'twist and go' e-bikes that don't require any pedal power input from the user. At the same time, the previous administration decided to extend the national E-scooter trials, citing a need to collect more data, whilst private E-scooters are being ridden illegally on our roads in ever greater numbers, with incidents being picked up by the MIB as the fund of last resort. We can only hope that

the new government looks to grasp the nettle when it comes to micromobility solutions.

Increasing mobility for all in society and doing so in a sustainable and cost-effective way is important, and is what underpins the Transport agenda. With Sector Focus Teams covering Motor, Products Liability and Technology & Cyber Liabilities to name but a few, FOIL is well placed to help shape the future landscape.

To mark the end of my year as FOIL President, I would like to invite you to a conference of debate, vision and insight exploring topical issues and looking forward to 2025 (see page 6).



## Notice of FOIL Annual General Meeting

### AGM OF THE FORUM OF INSURANCE LAWYERS

The FOIL AGM will be held on **21<sup>st</sup> November 2024 at 12:00**. This will be an in-person event at the offices of **DAC Beachcroft**, The Walbrook Building, 25 Walbrook, London EC4N 8AF and will be followed by the President's Conference.

If you would like to attend the AGM please click [here](#) to add the event to your diary.

Subject to election, Howard Dean of Keoghs is FOIL's President-elect for 2024-2025.

The link to the minutes of the AGM in 2023 is [here](#).

The link to the proposed resolutions for consideration at the AGM is [here](#).

The link to the FOIL constitution is [here](#).

## FOIL President's Conference 2024

### "NAVIGATING THE NEW NORMAL"

**Thursday 21<sup>st</sup> November 2024 13.00 at DAC Beachcroft – The Walbrook Building, 25 Walbrook, London EC4N 8AF**

To mark the end of Pete Allchorne's year as FOIL President, we would like to invite you to a conference of debate, vision and insight exploring topical issues and looking forward to 2025. Spaces are limited, so please click [here](#) to register your place.

13:00-13:45 Registration and lunch

13:45-14:05 Welcome and FOIL update – Pete Allchorne (DAC Beachcroft), Laurence Besemer, CEO, FOIL and Dr Jeffrey Wale, Technical Director, FOIL

14:05-14:25 Fireside Chat: *Shaping the Future* - Bridget Tatham (Browne Jacobson), Gillie Fairbrother (Davies) and Sean McGahan (DAC Beachcroft)

14:25-15:15 *Resilience in the workplace* - Patrick Regan, OBE, Director, Brighter Days

15:15-15:45 Tea / Coffee / Networking Break

15:45-16:15 *An industry perspective: the ABI's priorities with the new Government* - Mark Shepherd, Assistant Director, Head of General Insurance, ABI

16:15-17:00 *Perspectives on the new Labour government...and what it means for insurance* - The Rt Hon The Lord Hunt of Wirral, MBE, PC and The Rt Hon Charles Clarke

17:00 Closing remarks and drinks reception

## Implausible Injuries

### Did the Whiplash Reforms Really Make Us All Go Weak at The Knees?



**Steven Cross (Head of Claims, Markerstudy Insurance Services Ltd)**

#### In Brief

The Whiplash Reforms of 2021 aimed to reduce whiplash claims, but have they led to an increase in multi-site injury claims?

In the years following the Woolf Reforms, it became something of a cliché that the citizens of England and Wales had the weakest necks in Europe – a reflection on the perceived “epidemic” of whiplash claims here in comparison to our continental neighbours. But did the attempts to resolve this issue just create another one? Have the Whiplash Reforms of 2021 simply created the weakest knees, elbows, ankles, wrists and fingers in Europe instead?

The data certainly suggests as much. According to benchmarking data, in the last 12 months nearly half of injury claims were for a combination of a tariff whiplash and one or more additional non-tariff injuries. In 2019

(the last pre-reform, pre-lockdown year) the same claims had accounted for less than 30% of incoming cases. Overall, the figures suggest a shift from cases where the only injury claimed for was whiplash, to multi-site injuries – in a time when vehicles are meant to be getting safer. This shift has significant impact on insurers due to the difference in overall costs in handling these cases.

The introduction of the Whiplash Tariff (combined with the increase in the Small Claims Track Limit for injury claims) was designed by the MoJ to limit and control the cost of whiplash claims. In addition, the friction and operational cost of dealing with a tariff whiplash claim would be significantly reduced for all, by minimising the time spent scrutinising, valuing and negotiating the claim.

The benefit to a Claimant and their solicitor of pursuing a claim with whiplash and accompanying additional injuries is clear, with the non-tariff elements often attracting awards significantly higher than the tariff element. In addition, the door is opened for further medical evidence and treatment, and, most importantly for the Claimant Solicitor, creates far greater potential to move the claim out of the SCT and into a cost-bearing track.

Some of the increase in the frequency of additional non-tariff injuries is undoubtedly the result of changes in reporting patterns – pre-tariff, a bruise or sprain to a limb would add only a few hundred pounds to the value of a case which might have already attracted £5000 or more for the whiplash alone. As a result, claimants did not necessarily report the additional injury, and even where they did, some insurers may have chosen not to register it when inputting the injuries into a valuation tool. But is there more to the increase than this?

Interestingly, the movement from whiplash only to mixed injury claims is far less

pronounced in cases where the Claimant is unrepresented, with less than a 5% shift on pre-reform figures.

This illogical shift in represented claimants' injuries has made it necessary for insurers to scrutinise the plausibility of the injuries presented like never before and raises the question of why they do not appear to have been scrutinised by the claimant law firms prior to being presented. We will not be alone in receiving a high proportion of claims for a whiplash plus injuries to other parts of the body, in what was a seemingly unremarkable collision, without any explanation of how any of the additional injuries occurred.

Whilst Medco have impressed on experts the importance of explaining the mechanism of these injuries, too often the "explanation" is either hopelessly vague ("impact with the interior of car") or make no sense when looked at in combination – it may be possible to hit one's knee on the steering column, or to jar the ankle of the same leg on the pedal, but it's significantly harder to do both simultaneously.

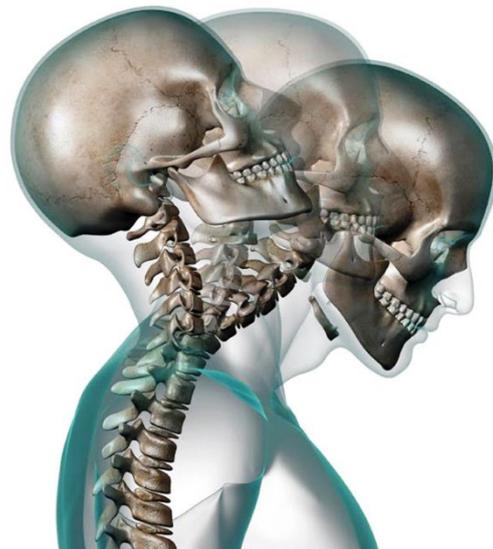
Markerstudy are committed to challenging any claim that is presented with injuries that are simply unexplained and/or implausible, with clearly exaggerated or invented injuries being pursued to trial and any available sanctions being sought in appropriate cases.

Alarming, over 40% of the non-tariff OIC injuries presented are currently giving rise to enough concern to at least go back to the Claimant and ask them to explain how the injury occurred.

Like any insurer, our objective is to resolve any genuine injury as quickly and fairly as possible, but the phenomenon of implausible injuries is a significant blocker to securing the level of efficiency that is desired by insurers and claimant law firms alike.

How do we solve this problem? Well it's not rocket science – Medco must ensure the examining doctor explores the mechanics of every injury the claimant is describing (and whether it was caused in the accident) and the claimant law firms must ensure this has been done when submitting their client's medical evidence. Maybe then we will see the proportion of multi-site injuries return to a more realistic level.

On a lighter note, our screening does give us moments of amusement when we read about the driver who allegedly hit his knee on the back of his own seat or the multiple passengers who have jarred their wrists on the steering wheel, and quite what are all these people doing to hit their knees on the dashboard...



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## Official Injury Claim

### Paul Finn (FOIL Technical Author)

The Official Injury Claim (OIC) service is designed to help individuals make personal injury claims following road traffic accidents in England and Wales. It is part of the reforms introduced to streamline the claims process. The OIC portal aims to assist claimants in valuing their claims and navigating the legal process without needing extensive legal knowledge.

The OIC service, introduced as part of the Civil Liability Act 2018, represents a transformative approach to handling minor road traffic accident (RTA) claims in the UK, particularly those involving whiplash injuries. This digital platform is designed to streamline the claims process, reduce fraudulent claims, and ultimately lower insurance premiums. Below is an in-depth exploration of the OIC process, its stages, and its broader implications for the transportation claims landscape:

### Detailed Stages of the OIC Process

- 1. Claim Initiation:** The process begins with the claimant accessing the OIC portal to determine eligibility. This involves entering detailed personal information, specifics of the accident, and preliminary evidence such as photographs, witness statements, or dashcam footage. The portal is designed to be user-friendly, allowing claimants to navigate the initial stages without legal assistance.
- 2. Liability Determination:** Once the claim is submitted, the compensator (usually the insurer of the at-fault party) reviews the details to assess liability. This stage involves a thorough examination of the evidence provided by the claimant. The compensator must respond within a specified timeframe, either admitting or denying liability.

- 3. Medical Assessment:** A critical component of the OIC process is obtaining a medical report to substantiate the injury claims. The portal guides claimants through selecting a medical expert from an accredited list to conduct an independent examination. The resulting report is essential for determining the severity of the injuries and the appropriate compensation amount.

- 4. Negotiation and Offer:** After liability is established and medical evidence is provided, the compensator makes an initial settlement offer. The claimant has the option to accept this offer, reject it, or negotiate further. The OIC portal facilitates this negotiation process, allowing claimants to make counteroffers and engage in discussions directly with the compensator.

- 5. Settlement or Escalation to Court:** If the parties cannot reach an agreement through negotiation, the claimant may choose to escalate the matter to court. The OIC provides resources and guidance for claimants considering this option, including templates for court forms and procedural advice. This stage ensures that claimants have a pathway to seek judicial intervention if necessary.

### Broader Implications for Transportation Claims

#### Impact on the Legal Sector:

The OIC aims to reduce reliance on legal representation by simplifying the claims process, potentially leading to decreased legal costs. However, this shift has raised concerns regarding access to justice, particularly for claimants who may lack the expertise to effectively negotiate with insurers. Legal professionals have expressed concerns about potential power imbalances, as claimants may face challenges when dealing with well-resourced insurance companies.

**Impact on the Insurance Sector:** The introduction of the OIC is expected to lead to a reduction in fraudulent claims that have historically inflated insurance premiums. By streamlining the claims process and introducing standardised procedures, insurers can achieve more predictable outcomes and potentially lower operational costs. This could translate into reduced premiums for consumers, aligning with the government's objective of making motor insurance more affordable.

### Challenges and Criticisms

Despite its intended benefits, the OIC has faced criticism for its complexity and perceived disadvantages for unrepresented claimants. Issues such as delays in settlements, technical challenges with the portal, and low public awareness have been highlighted by claimant lawyers and the justice select committee. Additionally, recent judicial decisions have influenced how claims are valued—particularly those involving mixed injuries—adding another layer of complexity to the process.

### Conclusion

The OIC service represents a significant shift in handling minor RTA claims, reflecting broader efforts to modernise the personal injury claims landscape in the UK. While it aims to simplify processes and reduce costs, its effectiveness and impact on both legal and insurance sectors are subject to ongoing evaluation. As this system matures, further reforms and adjustments may be necessary to address identified challenges and ensure that it meets its intended objectives of fairness, efficiency, and accessibility. The legal community, insurers, and policymakers must continue collaborating to refine this system and address emerging issues to maintain confidence in the claims process.

## Transport Past, Present and Future



**Ruth Graham (DWF Partner) and William Balfry (DWF Senior Associate)**

### In Brief

Recent years have seen significant advancements in alternative transport technologies, driven by climate change and COVID-19, altering transport habits and presenting new challenges for insurers, claims, and underwriters. This article provides an overview of current statistics and trends.

### Introduction

There is no doubt that the last few years in particular has seen a huge leap forward in both the technology and the amount of alternative transport solutions since Karl Benz invented the humble car powered by the internal combustion engine.

Driven by need (climate change) or circumstances (Covid-19) transport habits and use are changing frequently bringing new challenges to insurers, claims and underwriters and a lot of information to absorb.

In this article we outline what we have noted to be happening in the different areas, and we start with an overview of the current statistics.

### **Transport Statistics**

The Government has kept more detailed statistics on transport in the wake of Covid-19.

The latest statistics indicate that while overall transport levels on the road are higher than before the Covid-19 pandemic at 104%, public transport is still below the January 2020 total, bus use excluding London stands at 90% whilst the London figure is 88%. This is probably because of the change in working habits with the return to the office being on average 2-3 days a week. The stats can be viewed [here](#). (Gov.UK 09.10.24).

### **How Smart are Smart Motorways?**

According to a Panorama investigation not very! National Highways' latest figures suggest if you breakdown on a smart motorway without a designated hard shoulder you are three times more likely to be killed or seriously injured than on one with a hard shoulder.

The technology used to manage smart motorways has stopped working hundreds of times according to the BBC. The Government has stopped new smart motorways being built but approximately 10% of UK motorways remain smart, 79 plus deaths suggest otherwise – depending on the facts of an

accident surely there could be an argument if a claim is made that a contribution should be sought from the Department of Transport.

### **Where are we with E-Scooters?**

In short, nowhere in terms of legislation, things have not moved on over the last 3-4 years. The only E-scooters that can legally be ridden on the roads are those involved in the Government/Local Authority hire schemes. Even now, changes are being made to the long-standing trials, with London easing restrictions on 'no go' zones to prevent rider issues when the scooter slows when entering said zone. Clarity from the government sooner rather than later would be welcomed.

Whilst a lot of bad behaviour occurred in the early days (pavement riding, multiple users, below age use, riding under the influence of alcohol) riders then realised the hire was linked to their driving licences and any penalty points imposed as a result of scooter offenses appeared on their driving licence.

Most of the issues have involved privately owned E-scooters being ridden illegally and often they are poor quality products with speed enhancements.

The new Government has not yet indicated its position on E-scooters and micro-mobility and what legislation will be introduced. The trials run to 2026 so no answers are imminent, despite recommendations in 2020 from the DFT and PACTS that E-scooters should be legalised with regulation on age, speed, power and use.

In Ireland E-scooters have recently been legalised, the data produced by this development will be interesting and helpful for the UK market.

The latest statistics on E-scooters in Britain can be accessed [here](#). (Gov.UK 26.09.24). They show a fall in serious incidents and fatalities between 2022 and 2023.

In relation to Civil Liability, we do not yet have a judgment on the potential defence of *ex turpi causa* and it needs to be adjudicated upon. It has been argued in pleadings and in Court, but no finding has yet been made. Will it be a complete defence or will the argument lead to a reduction for contributory negligence?

### **What about E-bikes?**

It was initially thought E-bikes presented less of an issue perhaps because they are more like a traditional bike and sturdier in build, however, there have been concerns because souped up E-bikes able to travel up to 70mph have appeared on the roads.

New figures released by 27 police forces confirm a steep increase in the number of seizures of E-bikes which have been illegally modified to travel faster than 15.5mph which is the permitted speed.

A freedom of information request confirmed the police have seized 937 E-bikes in the year to August 2024 up from 511 in the previous year.

### **Fire Risk Lithium Batteries**

London Fire Brigade reported 155 fires caused by E-bike batteries and scooter batteries in 2023 up 78%.

It is good to see legislation is being introduced with the Lithium-ion Battery Bill currently making its way through parliament. Hopefully as knowledge improves – basically do not charge indoors unsupervised - fires will reduce.

Ebay has just announced a ban on private sales of E-bikes on the platform and also sales of batteries due to the fire safety concerns. The ban comes in on 31 October 2024. The ban should also reduce the number of E-bikes being adapted.

### **Are EVs Becoming More Popular**

It seems external factors including the cost-of-living crisis and the lack of public charging points has slowed the growth in sales of EVs compared to sales of traditional ICE powered cars; nevertheless, electric vehicles now total over 1.2m on UK roads approximately 4% of the total vehicles up from 0.5% in 2020.

The Labour Government has reasserted a net zero pledge with a ban on sale of new petrol and diesel cars from 2030.

A major issue for motor insurers is the rising cost of claims; E-vehicles are expensive as are their parts, in particular the battery. This could lead to many EVs being written off. In addition, the length and cost of hire claims could increase because of the lack of EVs available for hire, credit hire firms will take full advantage. Also, there are skills gaps amongst mechanics and engineers relating to the new technology which could lead to longer repair periods.

### **Automated Vehicles**

Although the Automated Vehicles Act 2024 was passed into law in May 2024 a lot of secondary legislation is needed to add much needed detail. In particular what will be the position of the MIB?

The aim is for automated vehicles to be on our roads by 2026, but many say this is an ambitious target.

It is likely the most progress will be made in relation to public transport and commercial vehicles rather than private motor vehicles.

The CAV Forth Trials of automated buses continue with five autonomous single deck vehicles travelling a distance of 14 miles between Fife and Edinburgh across the Forth road bridge. The buses operated by Stagecoach East Scotland are used autonomously to level 4 standard which means a driver must remain on board during any journey in line with UK regulations. The trial is due to end in 2025. At the moment another member of staff travels on the buses as well as the driver to reassure passengers that the buses are safe to travel on. It is anticipated if the trial is successful the buses could provide an estimated 10,000 weekly journeys with the buses capable of carrying 42 passengers per trip.

### **Floating bus stops**

It is probably no surprise that floating bus stops do not float! However there have been a number of calls for an end to what is in reality a cycle lane running behind a bus stop. Visually impaired people say with some merit that these bus stops are dangerous because they have to cross the cycle lane to get to and from the bus stop. According to TFL the number of accidents are low saying there have been five pedestrian casualties involving cyclists and one involving an E-scooter in the cycle lane over a three year period. These incidents are often under reported, and it is common place to see E-scooters in cycle lanes so this scenario could give rise to a number of personal injury claims.

### **Wales speed limit reduction**

In Wales a 20mph speed limit was introduced. Wales was one of the first countries in the

world to pass a law changing the speed limit and restricted roads to 20mph. Restricted roads are usually in residential and built-up areas where there are a lot of pedestrians.

The Welsh Government believe this decision will reduce the number of collisions and severe injuries and encourage more people to walk and cycle and make the streets safer.

### **The Future**

In the United States Tesla CEO Elon Musk has championed autonomous driving, most recently he has unveiled the company's robo taxi and cyber cab with no steering wheel or pedals. Musk predicted they will be available in 2026 but then reverted to before 2027.

He has promised the robo taxis will cost less than \$30,000 and he announced plans to bring autonomous driving to his Model 3 and Model Y Tesla cars in California and Texas by next year.

The position in Europe is less advanced but VW announced they would start offering robo taxi test drives to customers in Hamburg.

So watch this space in the ever-changing world of transport and autonomous driving and micro-mobility where we also now have remote controlled electric skateboards zipping along pavements and public roads crashing into vehicles; they are classified as motor vehicles and therefore require registration, insurance and a licence to ride otherwise they are illegal.

Where will it all end?

## E-Transport: Driving Sustainable Solutions



**Steven Brownlee (FOIL Technical Author)**

Transportation has undergone a seismic shift in recent years, with electric vehicles (EVs) leading towards a greener, more sustainable future. Electric transport, referred to as e-transport, plays a pivotal role in progressing environmental, social, and governance (ESG) targets, with the transition towards electrification reducing carbon emissions while enhancing societal benefits by promoting sustainable practices and fostering a greener economy.

As the transport sector addresses the need to integrate ESG principles, innovations in EV technology and infrastructure continue to evolve rapidly. Partnerships between public and private sector organisations enable the development of charging networks and intelligent logistics systems, essential developments for achieving net-zero goals while meeting the challenges posed by climate change.

The evolution of e-transport is driven by a combination of technological advancements, regulatory changes, and growing environmental concerns. The journey began as far back as the late 19th century with the introduction of electric trams and vehicles. Oil

crises in the 1970s sparked renewed interest (in EVs), but it was not until the late 1990s and early 2000s that companies began to invest in e-transport significantly.

### Current Landscape

The adoption of EVs has accelerated at an unprecedented rate. New EV registrations in the UK have increased dramatically, with the Society of Motor Manufacturers and Traders (SMMT) recording that pure electric vehicles account for 16.8% of the total so far in 2024. This surge is driven by improved battery technology, expanded charging infrastructure, and growing environmental consciousness among consumers.

The sector has gained considerable momentum by several key developments, which include:

1. **Extended Range:** Modern EVs now boast ranges of more than 300 miles on a single charge.
2. **Faster Charging:** Rapid charging technologies mean EVs can reach 80% capacity in as little as 20 minutes.
3. **Vehicle-to-Grid (V2G) Technology:** This innovation allows EVs to draw power from the grid and feed it back.

Data from the International Energy Agency highlights that EV sales exceeded 14 million units globally in 2023, a significant increase from previous years. Governments are promoting charging infrastructure using grants and regulations, and companies are committing to sustainability goals, recognising that transport is responsible for a significant percentage of global carbon dioxide emissions. Urban sustainability is also being enhanced through the integration of electric vehicles into public transport systems.

### Emerging Technologies

The pipeline of innovations under review promises even more transformative changes.

**Solid-state batteries:** Promising improved safety and efficiency and longer lifespans, many manufacturers and tech companies are investing heavily in this technology, with some projecting commercial availability by 2025.

**E-fuels:** These synthetic fuels, produced from renewable electricity, offer potential solutions to decarbonise sectors where electrification is challenging, such as the aviation and marine industries.

**Wireless Charging Roads:** This concept, under trial in many countries, including the UK, involves wireless charging pads under road surfaces that charge cars as they drive.

**Autonomous EVs:** Electric and autonomous technologies could come together to make this a reality, with driverless taxis introduced in some US cities. However, cybersecurity continues to be a major concern in this area.

**Hydrogen Fuel Cell EVs:** These are gaining traction in long-haul and public transport due to quick refuelling times and long ranges, which make them an attractive option for heavy-duty applications.

**AI:** The integration of AI is transforming e-transport systems in many areas, such as optimising routes for EVs to reduce energy consumption or integrating smart traffic lights to prioritise non-motorised traffic and increase safety.

### ESG and E-Transport

E-transport integrates ESG criteria to create a sustainable transport sector, ensuring initiatives not only reduce emissions but also support social equity and comply with regulatory frameworks.

**Environmental Impact:** Promoting EVs minimises our carbon footprint and reduces our reliance on fossil fuels. EVs significantly lower greenhouse gas emissions compared to conventional petrol and diesel vehicles, and integrating renewable energy sources into the charging infrastructure can enhance the overall sustainability of e-transport, further mitigating environmental impacts.

**Social Considerations:** These factors can help build public trust and facilitate a smoother transition to electric mobility. E-transport solutions can lead to improved air quality and public health, particularly in urban communities, while providing employment within the sector can contribute to local economies. Access to public charging infrastructure is also vital to ensure all users, regardless of socioeconomic status, can access EVs.

**Governance and Regulation:** Effective implementation of e-transport initiatives relies on strong governance, with incentives crucial for boosting adoption and regulations needed to safeguard compliance with environmental standards.

### Challenges and Opportunities

The transition to e-transport presents challenges and opportunities within the scope of ESG considerations.

**Infrastructure Barriers:** A primary challenge is the infrastructure to support EVs and other e-transport solutions, as insufficient charging stations will impede adoption. Investment is, therefore, crucial, and a significant increase in charging points is required to meet future demand. Additionally, upgrades to the electrical grid will be necessary to handle increased loads from widespread EV usage.

**Innovation and Collaboration:** Developing new technologies can improve the sustainability of e-transport schemes and

collaboration between various stakeholders is vital in driving these innovations forward. Shared initiatives that address common goals can help to amplify the impact of innovation and accelerate implementation.

As more e-transport innovations move from concept to reality, they promise to transform how we travel forever. The move towards electrification is well underway and arriving fast, ensuring the future looks brighter and cleaner than ever.



## Diversity, Equity and Inclusion

**Bridget Tatham (Nat Exec, DEI chair and Partner Browne Jacobson) and Marlene Henderson (D & O SFT and Partner Browne Jacobson)**

FOIL's strap line is "Informing Progress-Shaping the Future" of insurance law, acknowledging the ever-changing face of insurance, the law and those who practice it.

It was with this in mind that we asked, who is practicing insurance law and are member firms looking at the impact of diversity, equity and inclusion policies and practices in the workplace on client and employee expectations. What is the ROI of DEI in terms of human and financial investment? And what are the risks of not getting DEI 'right'.

The independent 2024 report, "Transforming DEI Practices in UK Insurance Law" highlighted two stark findings. Firstly, despite the ongoing drive to increase the number of women in leadership roles, 51% of women believed that their progression had been limited by their gender. Secondly, 55% of non-white respondents also felt that their careers had stalled due to the colour of their skin. Further still, when looking at the employment regulatory frameworks which support DEI in the workplace, only 14% of those who had reported inappropriate behaviour, were happy with the outcome of a formal or informal process. See link to the [full report](#).

FOIL's DEI sub-committee, met with members in February 2024 to discuss the ramifications of the report's findings, drawing on a panel of experts to discuss what DEI is, what good looks like and whether the insurance industry has both the desire and the commitment to effect positive change in the industry. We also asked how, if at all, FOIL's member firms can help the sector, to better navigate the path for effective DEI change. The session of course

talked about concepts such as conscious inclusion training and how to be an anti-racist organisation but recognised that training alone will not shift mindsets and culture. Priorities need to be reassessed, in order to direct resource into DEI practices which could really drive change.

We asked what are the forces for DEI change in the insurance sector? Increased productivity? The client social value tender question? Or because diversity of thought is more likely to produce innovative solutions to assist our clients in today's market. However, creating a more diverse business, does not equate to a more inclusive business. Which means that there is a potential disconnect between the intended positive consequences of a more diverse team, department or business and the reality of a firm's culture. If non-white staff do not feel that they are included, or belong, they are likely to leave earlier than their white peers. This is known as the "stay-gap". There continues to be pay gaps between women and men, and between ethnic minorities and white employees.

The Professional indemnity SFT, picked up this question when asking if Employment Practices Liability (EPL) Insurance could be used as one tool which can positively impact behaviours and culture in the workplace. The truth is that DEI is not a nice to have, it is actually a way to ensure that businesses are not exposed to reputational and financial damage for losses flowing from breaches of the statutory regulation which uphold the protected characteristics. [Equality Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk)

EPLI claims tend to arise where the hiring, promotion, assessment or development of individuals goes awry, and provides protection against losses arising from alleged discrimination in employment practices. Whilst one's sex, has long been a protected

characteristic, 24 October 2024 saw the Worker Protection (Amendment of the Equality Act 2010), which strengthens the existing protection for workers against sexual harassment, by placing a new duty on employers to prevent sexual harassment. The fact that additional legislation is needed in 2024 proves, that we have a long way to go to change the cultures of workplaces, noting that the Sex Discrimination Act was enacted in 1975.

The SFT also wanted to explore the impact of increased scrutiny of DEI statements and practices on D&O insurance. The D&O SFT hosted a Roundtable discussion which focused on the "s" in ESG. The discussion was aptly entitled "Intent to Action" as it was noted that may SMEs and large corporates perhaps have policies to capture DEI but it remains questionable whether they implement such policies with the same level enthusiasm with which they represent their existence. D&O insurers should therefore be wary of "pinkwashing" (where companies overstate their DEI practices, policies and culture) which inevitably carries an exposure for D&O claims.

As such where DEI practices and policies are effectively implemented and imbedded with focussed targets for change, organisations should be able to minimise EPLI and D&O exposure, both in terms of premium spend, frequency and severity of losses.

The discussions in 2024 found firms to have an appetite for cultural change driven by sound, proven and impactful DEI practices. Staff value expectations are high, where culture of the business and what the leadership looks like, are ranked highly in decisions about whether to join one firm over another. Clients equally want to do business with organisations that are aligned to their values.

Putting business and reputational considerations to one side, delegates at both

sessions agreed that imbedding sound DEI practices, policies and processes, is simply the right thing to do.

## Connected and Automated Vehicles



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For members, who missed the presentation by Paul Yagmourian of the MIB discussing a range of issues concerning connected and automated vehicles, you can access a recording of the event using the following [link](#). This recording is only available to FOIL members.

## A Word from our Sponsor



Hawkins is the UK's leading firm of forensic investigators, servicing the requirements of the insurance, reinsurance and legal markets, corporate business and private individuals. We built our reputation through a combination of accurate advice, fast reporting and excellent customer communication. Hawkins is employee-owned, with no external shareholders or investors. This model enables us to remain independent and impartial in a business world increasingly dominated by private equity backed corporations. We act for both claimants and defendants in civil litigation matters without fear or favour, and customers can be confident in our integrity and impartiality.

The last 12 months has been a period of continual development for Hawkins with the opening of new offices, recruitment of more investigators and diversification into new areas of expertise. Early in 2024 we recruited a Mechanical Engineer, [James Atkinson](#) as the first investigator to staff our new Dublin office located at Glencullen House, 209 Kilemore Road, Inchore, to the west of the city. Jason has an impressive academic background with a first degree and a Masters from University College, Dublin and extensive experience in the manufacturing industry. He investigates Engineering Failures, Escapes Water, Gases and other Fluids, Fires and Explosions.

Recently, Hawkins also opened a Belfast office at 108 Forsyth House, Cromac St, Belfast, BT2 8LA located near the city centre. The office is staffed by [Gavin Dunn](#) who is a specialist Road Traffic Collision Reconstruction expert. Gavin joined Hawkins in 2022 from the Forensic Science Northern Ireland where he investigated serious and fatal road traffic collisions for the Police and Civil Authorities.

Gavin and Jason are supported by two longstanding Hawkins' investigators John Holland and Dr Christabell Evans, who are relocating from our Glasgow office, and new experts in Civil Engineering and Architecture will be joining later this year. Christabell is a material scientist with an aerospace background and specialises in investigating Escapes of Water and other Materials Failures. She is considered the foremost expert in failures involving chlorinated polyvinyl chloride (CPVC) pipework, a type of thermoplastic used for a variety of plumbing installations.

[John Holland](#) is a Regional Director with responsibility for the management of both Dublin and Belfast offices. John was previously the Regional Manager for Hawkins' Glasgow office and recently a Business Development Manager. John is a Mechanical Engineer with an excellent reputation investigating incidents involving serious personal injuries for both claimant and defendant law firms.

Elsewhere Hawkins continues to expand both our geographic coverage and expertise, with 13 new engineers and scientists joining in the previous 12 months to fill positions in our existing 11 offices in Great Britain, Dubai, Hong Kong and Singapore. We now include specialist knowledge in deep water cable installations associated with offshore power generation and geotechnics, alongside our growing built environment team. In addition,

Jessica Ng, a Marine Cargo specialist has relocated from Hong Kong to Calgary, and we are actively exploring the opportunity to open an office in Canada and in due course in other territories across the globe.

Watch this space!

### Are you interested in writing for the VOICE?

We rely on contributions from our members, sponsors, trade partners and others to produce each issue of the Voice. We are also interested in learning what subjects or themes you would like to see covered in the future.

If you are interested in contributing material to a future edition of the Voice or have any ideas for content, please feel free to contact [info@foil.org.uk](mailto:info@foil.org.uk) or any of the editors.

Many thanks.

## Cross-Border Personal Injury Claims Post-Brexit - an analysis of the latest case law



**Selma Tarim (Solicitor DWF) and Sara-Jane Eaton (Partner and Head of DWF's International Claims and Travel Group)**

Following the Brexit transition period which ended on 31 December 2020, the Brussels Regulation (EU) 1215/2012 ceased to apply to claims brought in the UK. As a result, UK residents are no longer able to rely upon the Regulation to establish jurisdiction in the UK Courts for personal injury and other losses following accidents in EU member states.

Post-Brexit, in order to pursue a claim in the Courts of England and Wales against a foreign tortfeasor and/or the foreign insurer in relation to an incident which occurred overseas, UK residents have to avail themselves of the common law rules. Under the common law rules, Claimants will need to

obtain permission to issue and serve a Claim Form out of the jurisdiction.

In order for permission to be granted for a tortious claim, Claimants must demonstrate that the action passes through the 'tort gateway' which is set out under Paragraph 3.1 of Practice Direction 6B and provides as follows:

*"(9) A claim is made in tort where –*

*(a) damage was sustained, or will be sustained, within the jurisdiction;*

*(b) damage which has been or will be sustained result from an act committed, or likely to be committed, within the jurisdiction;*  
*or*

*(c) the claim is governed by the law of England and Wales"*

The Supreme Court decision in *FS Cairo (Nile Plaza) LLC V Brownlie (2021)*, also known as *Brownlie 2*, is currently the leading case on the issue of tort jurisdiction gateway in which the Claimant was allowed to proceed having sustained 'indirect damage' in the jurisdiction of England and Wales.

### **CASE LAW POST-BREXIT**

Since Brexit, there have been a number of Court decisions in England where the test set out in *Brownlie* has been applied.

The latest key cases are as follows:

#### ***Graham v Fidelidade – Companhia de Seguros [2024]***

In *Graham*, the Claimant was on holiday in Portugal when a Portuguese vehicle collided with him. He sustained severe injuries to his left leg, which was amputated, and he sustained a series of other fractures, plus internal injuries. The Claimant had ongoing difficulties with mobility and continence and therefore required ongoing care. The

Claimant brought a significant claim for rehabilitation and prosthetics, the initial cost being in excess of £100,000. The Defendant made an application disputing jurisdiction after permission had been granted to serve English proceedings on the Portuguese insurer. The parties had already agreed that there were serious issues to be tried (the merits test), but the gateway and forum conveniens tests were disputed by the Defendant.

The Claimant relied on the fact that his claim was made in tort in order to get through the gateway. The Defendant disputed this as the Defendant insurer had not committed any tort against the Claimant, although it was agreed that the Claimant's claim would be tortious under Portuguese law. The Judge held that the Claimant was able to proceed through the tort gateway as she held that the claim against the Defendant insurer had to be tortious as whilst a contract existed between the Insurer and the Defendant driver, no contract existed between the Claimant and the Insurer, the action against the Insurer being an extension of the tortious action committed by their Insured.

In relation to forum conveniens, in other words, whether England was the appropriate forum to hear the case, the Judge took into account the fact that the Claimant was resident in England, and that the only witnesses would be English. It was found that the use of video-link and interpreters may lead to poorer quality of evidence.

Whilst Portuguese law would apply, the evidence suggested similarities in calculation as under English law. The Judge accepted the argument that the main issues would be factual rather than legal. The Judge therefore held that the natural forum was England.

### ***Ibrahim v Axa Belgium [2024]***

The Claimant brought a claim in England for damages for personal injury following a road traffic accident in Belgium. Following service of the proceedings, the Defendant made an application arguing that England was not the correct forum and that the Claimant's claim should be stayed.

The Defendant's application failed as it was made out of time, and they were unable to persuade the Court that there was a good reason for the breach. The Defendant was also unable to persuade the Court that Belgium was the appropriate forum. The Court took account of the fact that the Claimant had already been examined by English medico-legal experts.

### ***Winks v Huk-Coburg-Allgemeine Versicherung AG [2024]***

This case involved a road traffic accident where liability was admitted for an accident that had occurred in Germany. The following issues were considered by the appellate court as being of significance when considering forum: the applicable law, the whole of the dispute must be considered not just what is convenient for the Claimant, the location of the parties and the witnesses as well as the location of the Defendant who may be entitled to have the claim heard in its own jurisdiction.

### ***Moore v MACIF [2022]***

In the case of *Moore*, two English Claimants failed to establish jurisdiction over a French Defendant. One of the relevant considerations was that under French procedural law, they did not need to attend a hearing in France for determination of their claims, whereas in England it was possible that they would have to attend court (if their evidence was challenged in any way, to be cross-examined). This undermined their argument that it was

significantly more convenient for them for their claims to be heard in England. The Court found France to be the natural forum.

### ***Klifa v Slater [2022]***

In *Klifa*, the Claimant, who was domiciled in France, was injured by a UK-resident in a skiing accident in Courcheval, France. She instructed English Solicitors to pursue the tortfeasor and his insurer for personal injury and consequential losses. Although the Defendant's Solicitors confirmed pre-Brexit that they were instructed to accept service, proceedings were issued and served post-Brexit.

The Defendants argued that England was not the appropriate forum, but the Court held that the Defendants were unable to show that France was the appropriate forum. The Court found in favour of the Claimant citing amongst other points that the Defendants spoke English and were located in England, that the Defendant had engaged with the Pre-Action Protocol for a substantial period of time and that the Claimant could give evidence in English.

### ***Charlton v Deffert [2022] EWHC 2378 (KB)***

The Claimant who was domiciled in England sustained a personal injury following a road traffic accident in France. Whilst the Defendant instructed Solicitors in England to accept service of proceedings, once service was effected in England, the Defendant's Solicitors challenged jurisdiction.

The Defendant argued that France was the appropriate forum as the Defendant was domiciled there and French law applied.

However, the Defendant's application failed as the Court held that the Defendant was unsuccessful in proving that France was the appropriate forum. The Court considered the Defendant to have been properly served and

it was held that the proceedings would continue 'as of right'.

### **CONCLUSION – WHAT DO THE ABOVE CASES MEAN FOR INSURERS?**

There is a clear trend showing that Claimants are succeeding in passing through the tort gateway. However, the battle appears to take place in relation to forum non conveniens, which is to be decided at the discretion of the Judge depending on the relevant connecting factors.

In cases where the Defendant has accepted jurisdiction but has the burden of proving forum non conveniens, the Courts appear reluctant to agree with the Defendant. However, the Defendant appears to succeed more often when jurisdiction is challenged as of right and in lower value cases where less factual and expert evidence is required in the UK jurisdiction.

The recent judgment in the case of *Graham* seems to suggest that in large loss and catastrophic cases, the Courts of England and Wales are more likely to accept that the claim can proceed in the UK if the relevant factors are in the Claimant's favour.

What is clear is that each of the cases is very fact specific and hard to second guess.

What would change this position is the UK's accession to the Lugano Convention, which effectively reflects the previous position afforded under the Brussels Regulation. EFTA member states supported the UK's application to join this Convention made in 2020 but the EU declined. It will be interesting to see whether this application will be revisited by the new UK Government and whether the EU's appetite to allow the UK to accede to the Convention has changed since 2020.



Informing Progress - Shaping the Future

**Rebecca Barton (Forbes)****Tomorrow's FOIL in Brief**

Tomorrow's FOIL was launched in 2012 to cater for lawyers at member firms with less than 5 years' post qualification experience. This division runs learning and social events, helping to build career long relationships with fellow practitioners and counterpart insurance professionals.

Since the last edition of The Voice, Tomorrow's FOIL (TF) has been working hard at generating ideas on how to generate interest in the world of insurance law.

Current TF President Rebeca Barton of Forbes has recorded a podcast with Camilla Uppal for the Student Lawyer; this is being edited and should be available shortly. A link will be posted on the TF LinkedIn [page](#).

TF Executive member Tatiana Dall of Kennedys and Rebecca Barton have joined with several members of the FOIL National Committee to discuss FOIL's overall social media strategy and the best platforms to use in order to reach people. At the meeting we discussed who we wanted to reach, why we wanted to reach them and how we would go about it with one of the primary objectives being to show students and trainees what it is like to work in insurance law. There is to be a further meeting about this. The concerns that were brought up were mainly around the actual sites themselves and whether using such platforms such as TikTok would reflect well on FOIL as a whole. The group agreed that the world of social media is changing and that if we want to reach the younger generation of students and upcoming lawyers then serious consideration needs to be given to all platforms particularly those that are most popular with the target audience.

Tatina and Rebecca are also going to be involved in a roundtable meeting with the Chartered Institute of Loss Adjustors to see if we can work together to generate interest within loss adjusting as well as insurance law amongst undergraduates.

Rebecca and FOIL CEO, Laurence Besmer recorded a "fireside chat" recently and that is now live on the FOIL website. We encourage all those who are studying for a career in law to have a watch and take time to think about insurance law as an area to develop a specialisation. The recording can be found [here](#).

TF is always keen to hear new ideas about generating interest into Insurance Law for the future generation of lawyers.

Please keep an eye on LinkedIn and other relevant social media platforms for content relating to the amazing world of Insurance Law.



Informing Progress - Shaping the Future

## Personal injury Discount Rate



### Tara McSorley (Clyde & Co LLP and Chair of FOIL Northern Ireland)

The major news item in Northern Ireland is the reduction of the Personal Injury Discount Rate (PIDR). On 26th September, the Government Actuaries department published the new PIDR of 0.5% in NI and Scotland. The new rate, which took effect from 27th September 2024, represents the improved market conditions within which claimants have been investing their damages. This rate reflects an increase of 2.0% from the previous negative rate.

It is important to emphasise that this rate continues to reflect the principle of restitution where claims are put in the same position, they would have been in but for the injury they have sustained. The NI PIDR continues to represent 100% compensation for claimants rather than a reduction or increase in awards.

Whilst insurers have welcomed the PIDR, the question arises in relation to the effect of this for policyholders. Will insurers be in a position to reduce premiums to reflect the new PIDR? Will the periodic large claim

leading to a claim using the Ogden tables and the new PIDR offset the attritional claims across the board? With the 23% increase in general damages arising from the Sixth Edition of the new JSB Guidelines for Personal Injury Awards in NI ("The Green Book"), it may be that the NI PIDR alone may not have a significant effect for policyholders.



Informing Progress - Shaping the Future

FOIL Scotland awaits the final outcome of the [Scottish Law Commission Consultation on Damages for Personal Injury](#), which closed in 2022. The consultation was quite a mixed bag in terms of what it was looking at. There were proposals to widen the range of relatives in relation to whom services could be claimed (to bring Scotland more into line with England and Wales); to consider offsetting contractual benefits; to consider setting up a court of approval (children's claims are currently brought by parents and there is no scrutiny by the court) and proposals around provisional damages in asbestos claims. FOIL Scotland could be quite busy if the various Law Commission proposals are converted into legislation over the coming year.

The Scottish Government were due to carry out a 5-year review of QOCS in line with the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (although QOCS was not formally introduced until 2021). However, it is unclear whether that review will now occur.

Otherwise, in the arena of fraud, there is ongoing consideration of whether it is feasible for Scotland to adopt a legislative or similar instrument akin to fundamental dishonesty.



Informing Progress - Shaping the Future

## Case Spotlight - The Supreme Court finds the Expansion of Motor Insurers' Liability to be "an inevitable consequence of the CJEU case law".

Jessica Copley (Associate) and John Sheehy (Partner) of DAC Beachcroft, Dublin

### In Brief

On 10 October 2024 the Supreme Court delivered judgment in *Urban and Recycling Ltd & RSA Insurance v Zurich Insurance plc [2024] IESC 43* with potential wide-ranging implications for Irish motor and employers' liability insurers. In this article the authors examine the key elements of the decision and consider the possible consequences.

On 10 October 2024 the Supreme Court delivered judgment in *Urban and Recycling Ltd & RSA Insurance v Zurich Insurance plc [2024] IESC 43* with potential wide-ranging implications for Irish motor and employers' liability insurers.

In 2013 an employee ("JM") of Urban and Rural Recycling Limited ("URRL") was injured while operating the company's recycling truck. JM was stopped at the side of a public road and while operating a lift to deposit the contents of a bin into the truck, the bin fell resulting in serious head injuries to him. JM

had been the driver of the truck, and he was accompanied by the principal of URRL. JM initiated a claim for damages against URRL.

URRL had two relevant insurance policies: a motor fleet policy with Zurich and an employer's liability policy with RSA.

RSA argued that its policy contained exclusions for liability required to be covered by compulsory motor insurance under the Road Traffic Act 1961 ("the RTA"), and for liability covered under another policy of insurance.

Zurich argued that its policy contained an exclusion for bodily injury sustained to any person driving the vehicle or in charge of the vehicle for the purpose of driving.

The High Court had found that the RTA mandated that any liability arising from this claim be insured. The Court of Appeal found that the RTA did not require such cover, and that the Zurich policy did not apply. It is worth noting that under Irish law, employer's liability insurance is not compulsory.

On appeal, the central question for consideration by the Supreme Court was whether the liability of URRL to JM was a liability required to be covered by compulsory motor insurance under the RTA.

### **Compulsory Motor Insurance**

Section 56(1) of the RTA prohibits the use of a vehicle in a public place unless the user has an approved policy of insurance in respect of the user's liability for injury caused by the negligent use of the vehicle. This is one of the provisions relied upon as implementing Ireland's obligations under European Directive 2009/103/EC ("the 2009 Directive"), which provides for compulsory insurance in respect of civil liability arising from the use of mechanically propelled vehicles.

### Defining the "Use" of a Vehicle

It was accepted by both RSA and Zurich that the "use" of the vehicle for the purposes of S56(1) did encompass the operation of the bin lift while the vehicle was stationary, so there was no dispute as to whether this use related to the "function of the vehicle as a means of transport".

In any event, the Court noted that a broad meaning has been attributed to "use" by the Court of Justice of the European Union ("CJEU"). The CJEU has found that "use" includes any use consistent with the normal function of a vehicle as a means of transport (*Damijan Vnuk v. Zavarovalnica Triglav Case C-162/13*) and includes stationary uses, such as when a vehicle is parked (*Linea Directa Aseguradora SA v Segurcaixa Sociedad Anónima de Seguros y Reaseguros Case C-100/18*). The Court considered that, as the bin was being loaded for the purpose of transporting its contents, this use related to its function as a means of transport. It drew a distinction between that and uses which fall outside the operation of a vehicle as a means of transport, such as the operation of a fryer in a mobile food truck.

While it did not form part of the consideration of this case, the European Union (Motor Insurance) Regulations 2023 (which came into operation in Ireland on 23 December 2023 under Statutory Instrument 643/2023) have defined the term "use of a vehicle" in line with the CJEU judgments referenced above.

### Defining the User (or Users?) of a Vehicle

There was no dispute that JM was a user of the vehicle at the time of the accident. As such, Zurich argued that this claim could not be covered by S56(1); a person cannot incur a liability to himself and therefore the user of a vehicle can be liable only to a third party.

The Court agreed that JM could not maintain an action seeking damages for injuries caused

solely by his own negligence. However, as it is possible for there to be more than one simultaneous user of a vehicle, the court held that there was no basis under S56(1) to exclude all liability to JM simply because he was a user. It is within the scope of S56(1) for one user of a vehicle to recover damages sustained due to the negligence of another user.

This gives rise to the question, was URRL a user of the vehicle? The Court of Appeal held that a company could not physically operate a vehicle and therefore could not be a user. The Supreme Court disagreed and held that an employee using a vehicle in the course of their employment is, by definition, under the control of their employer and therefore an employer can be a user of the vehicle through its employee acting as its agent. The Court stated that this did not involve the employer being vicariously liable as such but rather "a straightforward issue of attribution according to the law of agency".

### Considering the Exclusions

Liabilities to the driver are permitted to be excluded under the 2009 Directive and the Court considered whether such an exclusion could be applied to JM. It was common case that, while JM was using the vehicle at the time the accident occurred, he was not driving it because he had parked up and alighted from it. The Court held that the word "driver" could not include a person who was not actually driving at the time of the accident. The Court also noted that, while the Directive does allow for an exclusion for liability to the driver, such an exclusion does not form part of S56(1).

Zurich sought to rely on its exclusion such that liability for bodily injury to any person "driving the vehicle or in charge of the vehicle for the purposes of driving" was excluded, "except so far as is necessary to meet the requirements of the RTA". The Court agreed that JM was "in charge of the vehicle for the purposes of

driving" when the accident occurred, but it found that the exclusion could not be relied upon as there is no basis under the compulsory motor insurance provisions to exclude such liability.

### An Uncertain Outcome

The Court held that, if JM's injuries were caused by URRL's negligent use of the vehicle, then URRL's liability to JM is captured by the scope of S56(1) and the Zurich motor policy must respond.

However, the Court was keen to highlight that as JM's claim against URRL was settled without proceeding to trial, there was no basis upon which the Court could make a determination as to the negligence or otherwise of URRL. Hence, it is now a matter for RSA and Zurich to address the application of this judgment to the facts of the case with regard to their respective policies.

### The Implications for Motor Insurers

It seems the liability of motor insurers must now extend to claims which, until now, would have been considered to fall within the scope of employers' liability policies. The Court observed this to be "an inevitable consequence of the CJEU case law". For instance, motor insurers may now have a liability in respect of commercial drivers injured whilst loading or unloading their vehicles, or in respect of drivers of company vehicles injured due to a defect in the vehicle.

Motor insurers will have to consider matters previously alien to them and a potential may be that commercial motor insurance premiums will increase to meet increased scope for liability.

A wider consideration arises as to whether Ireland's compulsory motor insurance regime properly complies with the state's obligations under the 2009 Directive. In particular, S56(1) limits compulsory motor insurance:

- to liability in negligence, whereas the obligation imposed by the 2009 Directive refers to the broader concept of "civil liability"; and
- to vehicles driven in a public place, whereas the 2009 Directive provides no such limitation. The Supreme Court was not required to consider this issue in the instant case.

The Court observed obiter that, if the RTA does not properly implement the 2009 Directive, then the effect (in light of *Smith v. Meade Case C-122/17 ECLI:EU:C:2018:631*) may be to expose the Irish state to the costs of compensating victims of accidents who should, more properly, be compensated by motor insurers. If the legislature sits up and takes notice of these comments, an even greater increase in exposure may be on the way for motor insurers.



## Operations Update



### Ian Thornhill (FOIL Ops Manager)

I was delighted last month that we were able to launch the updated version of the FOIL website, which we had been planning for some time, and I hope you like the new look.

As well as refreshing the front image page and making the site easier to navigate, there were other changes I would like to highlight:

1. We have a new DEI page which you can access under 'About Foil'. Our new DEI team will be posting helpful information and articles on this page including, a very interesting podcast with Gillie Fairbrother from Davies Group on the topic '*Are we actually making progress with DEI?*'
2. The Voice is now accessible on the front page of the website in a new flip book form to make it easier to read.
3. The Trade and Industry page now includes a short description of what each company can offer, and I hope our members can use this as reference page if you are looking for expertise in a particular area.

On the subject of our Trade and Partners, we had a very productive TIP away day last

month. It's always good to meet up with our Trade and Industry Partners in person to let them know what FOIL are doing and we took away some great ideas from our partners to look at ways to cement our relationship even further. One of the things we discussed was having two firms under the spotlight in every issue of The Voice. You will see the first two firms under the spotlight in this issue.

Our Social Media presence has increased to 943 on our FOIL LinkedIn account and we are still hoping to reach 1,000 by the end of the year. We recently set up a FOIL Social Media working group to focus on our social media strategy going forward as FOIL would like to move onto different platforms such as Instagram, particularly through Tomorrow's FOIL. We will have more news on this in the next issue.

We have recently put on a couple of events that are worth mentioning: *The Animals Act – A trot through the Essentials* was an online event we put on in conjunction with 9 St John Chambers. This was a very popular event, and we had many people ask if the event was going to be recorded as they were unable to attend. We are delighted to announce that the event was recorded and is now available on the FOIL website for anyone who missed it or wishes to watch it again.

*When ESG Lands in America* was another online event that was put on in conjunction with The Canadian Defence Lawyers. A big thank you to Laura Cooke of Clyde and Co and Zelda Pitman at Marsh who agreed to participate as speakers. This was a very interesting event on 'Greenwashing' involving a fictitious Texan oil company. We have recorded this event, and we hope to have this on the FOIL website shortly. I would recommend watching this one.

We recently had to postpone our '*Using AI to predict injury risk in Sport*' due to a

bereavement but we hope to reschedule this in the new year. On the horizon event wise, we have *'When AI goes wrong and it's still your fault - How much cover do you have for the professional use of AI'* which is a FOIL Roundtable event on Monday 11th November 2024, 9:30am, at Kennedys Law offices, 20 Fenchurch Street, London EC3M 3BY.

We have an *AI in recruitment event* which is in the early stages of planning and hot off the press, we can announce *'From Nonstick to Never Gone: The Story of PFAS'* which will be an online event on the 28th November with Jake Irwin from Hawkins as the guest speaker and you can now register for this event on the FOIL website.

Finally, from me, a big thank you to everyone who attended our FOIL Charity Quiz night at Grub in Manchester last month. We had 9 teams entered: 3x DWF, 2x DAC Beachcroft, 2x 9 St John Chambers, 1x Weightmans and a FOIL team. I think we were all taken aback by the first question which asked teams to draw their interpretation of an attractive horse! There were some sights to behold, some of which are still giving me nightmares! Thank you to DAC Beachcroft and 9 St John Chambers for donating raffle prizes. Once the dust had settled, we raised £478 and together with £689 raised after the golf event in May, we are able to report a total of £1,167 we have raised for the President's charity, Kintsugi Hope. Thanks again to everyone involved for both events.



Photo from FOIL Charity Quiz night



## FOIL in the Media (August – October 2024)



FOIL members regularly contribute to external media publications. Here are the contributions over the last quarter:

**Alec Cameron, FOIL member, of Birketts**, analysed the Baby Reindeer lawsuit in the Solicitors Journal. (25 July 2024)

**Pete Allchorne, President of FOIL, of DAC Beachcroft**, discussed the implications of the Automated Vehicles Act in Insurance Day. (7 August 2024)

**Andrew Steel, Public Sector & Blue Light SFT, of Weightmans**, offered commentary on the insurance implications of prison overcrowding in both Insurance Post and Claims Magazine. (21 August 2024)

**Tara McSorley, Chair of FOIL Northern Ireland, of Clyde & Co**, discussed the latest Northern Ireland Greenbook update in the Insurance Post. (3 September 2024)

**Pete Allchorne, President of FOIL, of DAC Beachcroft**, spoke about the thrill of being an insurance lawyer in the Solicitors Journal. (23 September 2024)

**James Power, FOIL Motor SFT, of Horwich Farrelly, and Nisha Hodges, FOIL member of Horwich Farrelly**, discussed the frequent failures of smart motorway technology in Insurance Edge. (30 September 2024)

**Christopher Stanton, FOIL member of Keoghs**, provided his insights on aggregation clauses in the New Law Journal. (4 October 2024)

**Max Withington, FOIL Credit Hire SFT, of Horwich Farrelly, and Graeme Mulvoy, FOIL member, of Horwich Farrelly**, explored non-party costs orders against credit hire companies in the Insurance Post. (8 October 2024)

**Paul Wainwright, FOIL Fraud SFT, of Browne Jacobson**, shared his thoughts on new regulations allowing banks to delay suspicious payments in Claims Magazine. (11 October 2024)

**Simon Curtis, FOIL CAT Claims SFT, of Horwich Farrelly**, wrote an article about the top five ways insurers can minimise the impact of catastrophic claims in Insurance Day. (11 October 2024)

**Andrew Steel, Public Sector and Blue Light SFT, of Weightmans** contributed a further article on prison overcrowding to the Solicitors Journal (24 October 2024)



## Consultations and Legislation

Dr Jeffrey Wale (FOIL Technical Director)

### Law Commission Consultation, Contempt of Court

The deadline for responses to the Law Commission consultation on Contempt of Court has been pushed to 29 November 2024. FOIL would encourage members and insurers to respond. Stakeholders should reflect on the words of Moses LJ in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin):

*'It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim either in relation to liability or in relation to claims for compensation as a result of liability. Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims and there is no other way to improve the administration of justice.'*

### Damages Claims and OCMC Portals

There are important changes on the horizon for the DCP and OCMC portals. There is planned expansion to the intermediate/multi tracks and mandatory use for legal

representatives in the OCMC. The OCMC has recently been expanded for litigants-in-person by virtue of the 173rd PD update. The net effect of these changes will be that a much wider range of users will be exposed to these digital claims' platforms. FOIL is pressing for improvements to be made around the online support mechanisms for these portals. This is justified both in terms of access to justice and to avoid the need for corrective action and time wasting in the civil court system. We have renewed our demand for an offline training (sandbox) environment. This would avoid the need for training in live claims environments. Watch this space.

### Legislation

The highly anticipated Employment Rights Bill has now been introduced into Parliament. There is a lot in the Bill, but Part 1 is of relevance to FOIL members and insurers, including proposed changes around worker status, zero hours contracts, flexible working, harassment and qualifying periods. There are also proposed changes around trade union laws.

The Property (Digital Assets etc) Bill has been introduced in the House of Lords. It builds upon previous work by the Law Commission and directly addresses the legal status of crypto/digital assets as a form of property.

We also have the Data (Use and Access) Bill which creates the possibility of divergence from the pre-existing GDPR framework post Brexit. The Bill covers a wide range of areas including access to customer and business data; digital verification services; public digital records; the retention of biometric data and electronic signature provision.

Other notable draft legislation to watch for includes the Renters' Rights Bill; Arbitration Bill; Terrorism (Protection of Premises) Bill; and the L-Ion Battery Safety Bill.

## Trade and Industry Partners Spotlight

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Trevor Gilbert & Associates

Trevor Gilbert & Associates is a multi-award-winning expert witness practice generally recognised as the UK's leading provider of loss of earnings reports.

We are instructed in cases of personal injury, clinical negligence, historic child abuse, matrimonial matters and employment tribunals (discrimination, unfair dismissal).

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## evelyn PARTNERS

Evelyn Partners is the UK's leading professional services and wealth management group, combining tax, accounting, financial planning and investment management services to private individuals and corporates.

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We assess claims for:

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- Loss of earnings to the self-employed
- Loss of pension benefits
- Loss of dependency in fatal accident claims.

Because everyone's financial needs are different, we work closely with our clients to provide a bespoke service.

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- Loss of earnings to the self-employed
- Loss of pension benefits.

These training sessions are practical, whereby attendees prepare calculations based on case studies presented to them. They last between 1.5 and 2 hours and full course notes are provided to attendees. For more information, please contact Simon Philpott: Tel: 0207 131 8412 Email: [simon.philpott@evelyn.com](mailto:simon.philpott@evelyn.com)

## New Trade and Industry Partner



FOIL is pleased to announce that **Aurora Forensic Consulting Limited** has recently joined our growing list of firms as the latest Trade and Industry Partner.



*"We're delighted to be part of the forum and are looking forward to working with members, many of whom we already know.*

*This is a fantastic opportunity to share insights into what fire investigation and forensic engineering has to offer, and to further our understanding of the needs of those engaged in insurance claims. All part of our commitment to clients to provide suitably focused advice and opinion in a form that meets their requirements"*

**Ken Roberts, Technical Director at Aurora Forensics.**

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